

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
VILLAGE OF CROTON-ON-HUDSON, NEW YORK,

Plaintiff,

Index No. 05-22176

- against -

Assigned Justice:
Hon. Francis Nicolai, J.S.C.

NORTHEAST INTERCHANGE RAILWAY, LLC,
and GREENTREE REALTY, LLC,

Defendants.

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**PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF APPLICATION FOR INJUNCTIVE RELIEF**

Preliminary Statement

Plaintiff's argument and defendants' argument read like ships passing in the night, because defendants' arguments are based on two mistaken notions, which this memorandum of law will attempt to clarify. The first is the notion that the special permit Metro Enviro was operating under was a typical special permit, granted for an enumerated use in the zoning district in which it lay. That is incorrect. Rather, it was a special permit for a nonconforming use, i.e., a use not enumerated in the zoning district. As discussed in Points III and IV below, different legal principles and different rules of statutory construction apply to each type of special permit, the most significant being that special permits for a nonconforming use are not construed in favor of the property owner, and ordinances regarding them "should not be given an interpretation which would permit

an indefinite continuation of the nonconforming use.” Franmor Realty Corp. v. LeBoeuf, 201 Misc. 220, 224, 104 N.Y.S.2d 247, 251 (Sup. Ct. Nassau County 1951), affirmed, 279 A.D. 795, 109 N.Y.S.2d 525 (2d Dep’t 1952).

The second, equally important, misconception defendants’ argument is based on its position that transfer stations, or waste processing facilities, were a conforming use in the LI District when Metro Enviro began operating its C&D waste transfer station in 1998. As shown in Points I and II below, waste processing facilities have not been a permitted use, either as of right or by special permit, in the LI District (in which 1A Croton Point Avenue lies) since 1979. They were not a prior nonconforming use when Metro Enviro’s predecessor began operating a wood waste processing facility at the site in the mid-1980s, and *a fortiori*, were not a prior nonconforming use when Metro Enviro started up operations some ten years later. A transfer station, therefore, is not a lawful nonconforming use, as that term of art is defined in the Croton-on-Hudson Zoning Code and has been defined by the Court of Appeals, because it was not a permitted use in the zoning district at the time it commenced.

Defendants, therefore, have no basis for relying on the Zoning Code provision that a nonconforming use may continue indefinitely. Rather, the two transfer stations that operated at the 1A Croton Point Avenue site from the mid-1980s through the summer of 2005 were allowed only by nonconforming use special permits, which permits have terminated. Since a transfer station was permitted only by virtue of a nonconforming use

special permit, once the permit was terminated, the right to operate the use terminated.

Even if this Court were to rule that a transfer station could continue to operate at 1A Croton Point Avenue, any new operator would have to obtain a special permit for the use. Metro Enviro's special permit had an expiration date (which time limitation is permissible under § 230-56 of the Croton-on-Hudson Zoning Code), after which the applicant had to come before the Board of Trustees for a determination of whether to renew it. As this Court is aware, the Board of Trustees decided not to renew it. Since the Metro Enviro permit expired, and the transfer station use existed only by virtue of the special permit, at the very minimum, a subsequent entity seeking to operate a C&D waste facility 1A Croton Point Avenue would have to submit to the Board of Trustees for a determination as to whether it should be issued a special permit.

POINT I

TRANSFER STATIONS, OR WASTE PROCESSING FACILITIES, HAVE NOT BEEN A PERMITTED USE IN THE VILLAGE SINCE 1979.

Although the Village, in 2001, adopted an express provision in its Zoning Code that "[s]olid and liquid waste transfer and storage stations and landfills (including construction and demolition materials) are prohibited," transfer stations, or waste processing facilities, had not been a permitted use in the Village beginning with the 1979 Zoning Code.

The 1961 Croton-on-Hudson Zoning Code permitted in the Manufacturing M District (the zoning classification for 1A Croton Point Avenue at the time) as an as-of-right use:

Manufacturing, assembly, converting, altering, finishing, cleaning
any other processing *or storage* of products *or materials*
[§ 3.10.1.g]

The relevant pages from the 1961 Zoning Code are annexed to the Affirmation of Marianne Stecich dated March 13, 2006 (“Stecich Affirmation”) as Exhibit 1. Although the record does not reflect that a transfer station or other waste facility existed at any time the 1961 Code was in effect, such a use would have fit within the use category cited above, because the processing and storage *of materials* was permitted. In addition, there was no requirement that the processing be “light.”

The 1961 Code was replaced by the 1979 Zoning Code, which changed the zoning classification for 1A Croton Point Avenue from Manufacturing M to Light Industrial LI and modified the manufacturing and assembly use to permit, as-of-right, the following:

Light manufacturing, assembling, converting, altering, finishing,
cleaning or any other processing *of products*. [§3.10.2.b]

The relevant pages from the 1979 Zoning Code are annexed to the Stecich Affirmation as Exhibit 2.

Two wording changes from the 1961 to the 1979 Code are significant, and each of them excludes C&D processing facilities as a permitted use. First, the phrase “or

materials” was deleted. Therefore, the processing *of materials* was no longer permitted. “Processing of products” – the term used in the 1979 and subsequent codes – is a narrower use than “processing of products or materials” – the term used in the 1961 Zoning Code. “Materials” is defined in Webster’s New World Dictionary as “what a thing is, or may be, made of; elements, parts, or constituents; something that occupies space.” C&D debris would fit within this definition. “Products,” by contrast, is defined as “something produced by nature or made by human industry or art.” This term does not encompass construction and demolition debris, which is waste.

Second, the word “light” was added to limit “manufacturing, assembling . . . or any other processing products.” A C&D facility does not involve *light* processing. The following two definitions of the term “light industry” from the American Planning Association’s Glossary of Zoning, Development and Planning Terms demonstrate that C&D transfer stations are not the type of use contemplated in a Light Industrial zoning district:

Research and development activities, the manufacturing, compounding, processing, packaging, storage, assembly, and/or treatment of finished or semi-finished products from previously prepared materials, which activities are conducted wholly within an enclosed building. Finished or semi-finished products may be temporarily stored outdoors pending shipment.

Enterprises engaged in the processing, manufacturing, compounding, assembly, packaging, treatment, or fabrication of materials and products, from processed or previously manufactures materials. Light industry is capable of operation in such a manner as to control

the external effects of the manufacturing process, such as smoke, noise, soot, dirt, vibration, odor, etc. A machine shop is included in this category. Also included is the manufacturing of apparel, electrical appliances, electronic equipment, camera and photographic equipment, ceramic products, cosmetics and toiletries, business machines, fish tanks and supplies, food, paper products (but not the manufacture of paper from pulpwood), musical instruments, medical appliances, tools or hardware, plastic products (but not the processing of raw materials), pharmaceuticals or optical goods, bicycles, any other product of a similar nature.

The 1990 Zoning Code as originally enacted was identical to the 1979 Code on the “light manufacturing . . .” use in the LI District. [§ 230-18 B(2)]

That waste processing facilities do not fit within the “light manufacturing, etc.” use category is confirmed by the facts that both Liguori and Metro Enviro, in seeking to operate waste processing facilities at 1A Croton Point Avenue, applied to the Board of Trustees in 1986 and 1996, respectively, for special permits to change from one nonconforming use to another.

POINT II

THE TWO WASTE PROCESSING FACILITIES THAT OPERATED AT 1A CROTON POINT AVENUE WERE NOT LAWFUL NON- CONFORMING USES THAT COULD BE CONTINUED INDEFINITELY.

Under the 1979 Zoning Code, “uses existing on the effective date of [the 1979 Zoning Code], which . . . uses do not conform to the requirements set forth in [the 1979 Zoning Code]” could be “continued indefinitely.” § 7.1 of the 1979 Zoning Code,

Stecich Affirmation, Exhibit 2. This same provision was included in the 1990 Zoning Code as § 230-53.A(2), and continues in the present Code.

It is critical to understanding this case to realize that in 1979, a waste processing facility was *not* legally operating at 1A Croton Point Avenue. This is why, in the mid-1980s, the then owner of the site applied for a nonconforming use special permit in order to operate a waste processing facility. Under § 7.1.1.2 of the 1979 Code, a nonconforming use could be changed to another non-conforming use by obtaining “a special permit from the Village Board of Trustees, and then only to a use which, in the opinion of said Board, is of the same or a more restricted nature.” Stecich Affirmation, Exhibit 2.

If a waste processing facility were operating at the site prior to 1979, the owner would not have had to apply for a permit to change to a different nonconforming use. Yet, in the mid-1980's, Robert Liguori (then the owner of 1A Croton Point Avenue) had a nonconforming use on the site and wanted to change it to a wood waste recycling facility, a different nonconforming use. The Croton-on-Hudson Zoning Board of Appeals determined that Liguori had to obtain a special permit, under § 7.1.1.2 of the Zoning Code, to use the site to “transport[], transship[], recycle[] and dispose[] of non-putrile solid waste, consisting primarily of railroad ties, poles, metal and paper.” A copy of the Village Engineer's correspondence, along with the ZBA minutes relating to this issue are annexed to the Stecich Affirmation as Exhibit 3. On June 20, 1988, the Board of Trustees granted Liguori a nonconforming use special permit, which was regularly renewed

through September 30, 1997.

In 1997, when Greentree Realty bought the site from Liguori and leased it to Metro Enviro, Metro requested renewal and transfer of the special permit. The Village determined that the special permit could not be renewed, however, because Metro's proposed use as a C&D facility was different. The special permit issued to Liguori permitted only wood waste; Metro proposed to handle more than wood waste. Metro applied to the Board of Trustees for a special permit, and on May 6, 1998, the Board of Trustees issued a special permit under § 230-53.A (the successor to § 7.1.1), to change from one nonconforming use to another nonconforming use. The relevant pages of the minutes of the Board of Trustees' discussion and vote on this special permit are annexed to the Stecich Affirmation as Exhibit 4.

The waste processing facilities, allowed by the nonconforming special use permits, were *not in existence* on the date the 1979 Zoning Code went into effect, so are not permitted to "be continued indefinitely." The protection for nonconforming uses extends only to "a use that was legally in place at the time the municipality enacted legislation prohibiting the use." Valatie v. Smith, 83 N.Y.2d 396, 399, 610 N.Y.S.2d 941, 942-43 (1994). Because a waste processing facility did not legally exist at 1A Croton Point Avenue when the 1979 Zoning Code was enacted, a waste processing facility is not entitled to be "continued indefinitely."

To the extent that there is an issue as to whether a waste processing facility was a

lawful nonconforming use – which the Village strongly believes there is not – that issue would have to be resolved, in the first instance, by the Village’s Zoning Board of Appeals. “[T]he determination of whether a particular use is a continuation of or a change in a nonconforming use is a factual one which should be decided in each case by the zoning board.” City of Albany v. Feigenbaum, 204 A.D.2d 842, 843, 611 N.Y.S.2d 719, 720 (3d Dep’t 1994). Accord, Tri-State Video Corp. v. Town of Stephentown, 1998 U.S. Dist. LEXIS 1899 at 11 (N.D.N.Y. 1998).

Greentree apparently recognized this and, on July 20, 2005, the attorneys for Greentree and Metro Enviro wrote to the Village Engineer to confirm “that the use of the Property [1A Croton Point Avenue] for the existing construction and demolition (C&D) debris solid waste processing and transfer operation is legally allowed to continue as a ‘nonconforming use.’” On October 28, 2005, the Village Engineer wrote that it was not. On December 22, 2005, Greentree appealed that ruling to the Zoning Board of Appeals, which had the matter on the agenda for its February 8 and March 8, 2006 meetings. Shortly before each meeting, Greentree asked the ZBA to adjourn the matter. The question is still pending before the ZBA.

POINT III

ZONING PROVISIONS PERTAINING TO NONCONFORMING USES ARE **NOT** TO BE CONSTRUED IN FAVOR OF THE PROPERTY OWNER.

In arguing that the Village's "requested interpretation displays a lack of understanding of statutory construction," (Defendants' Memorandum of Law at 5), defendants are highlighting *their* misunderstanding of municipal zoning law. The well-settled rule as to statutory provisions relating to nonconforming uses is that they are to be construed in favor of eliminating the nonconforming use. The Court of Appeals explained this rule in Off Shore Restaurant Corp. v. Linden:

It has been said in New York that a zoning ordinance must be "strictly construed" in favor of the property owner. . . . By way of counterpoint, however, it has been said, with equal conviction, that the courts do not hesitate to give effect to restrictions on nonconforming uses. . . . It is because these restrictions flow from a strong policy favoring the eventual elimination of nonconforming uses.

30 N.Y.2d 160, 164, 331 N.Y.S.2d 397, 401 (1972) (citations omitted).

The Second Department Appellate Division has frequently relied on this rule of statutory construction. In Albert v. Board of Standards and Appeals, in interpreting a zoning code provision regarding a nonconforming structure, the Court wrote:

While it is customary for a zoning ordinance to be strictly construed in favor of the property owner, there are countervailing considerations when the ordinance limits the extension of nonconforming uses, because such uses detract from the

effectiveness of the comprehensive zoning plan. . . . Thus the judiciary does not hesitate to give effect to restrictions on nonconforming uses due to the strong policy favoring the eventual elimination of these uses.

89 A.D.2d 960, 454 N.Y.S.2d 108, 110 (2d Dep't 1982) (citations omitted). And, in Franmor Realty Corp. v. LeBoeuf, in finding that the right to a prior nonconforming use had been lost, the Court reasoned:

[T]he policy of the law is the gradual elimination of nonconforming uses and, accordingly, ordinances should not be given an interpretation which would permit an indefinite continuation of the nonconforming use.

201 Misc. 220, 224, 104 N.Y.S.2d 247, 251 (Sup. Ct. Nassau County 1951), citing 8 McQuillin on Municipal Corporations [3d ed.], § 25.189, affirmed, 279 A.D. 795, 109 N.Y.S.2d 525 (2d Dep't 1952).

POINT IV

A SPECIAL PERMIT FOR A NONCONFORMING
USE IS ENTIRELY DIFFERENT FROM A SPECIAL
PERMIT ALLOWING A PARTICULAR USE AND
IS GOVERNED BY A COMPLETELY DIFFERENT
SET OF RULES.

Defendants' reliance on case law pertaining to conventional special permits is misplaced, because the nonconforming use special permit under which Metro Enviro was operating is not the conventional special permit recognized in Town Law § 274-b and Village Law § 7-725-b. A conventional special permit is "an authorization of a particular

land use which *is permitted* in a zoning local law, subject to requirements imposed by such local law to assure that the proposed use is in harmony with such local law and will not adversely affect the neighborhood if such requirements are met.” Village Law § 7-725-b (1); Town Law § 274-b (1). It is frequently stated that the classification of a particular use as a special permit use is “tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood.” North Shore Steak House, Inc. v. Board of Appeals, 30 N.Y.2d 238, 243, 331 N.Y.S.2d 645, 649 (1972). Accord, Twin County Recycling Corp. v. Yevoli, 90 N.Y.2d 1000, 1002, 665 N.Y.S.2d 627, 628 (1997); Gordon & Jack v. Peterson, 230 A.D.2d 856, 646 N.Y.S.2d 824 (2d Dep’t 1996).

This type of special permit is virtually the polar opposite of the Croton Zoning Code’s nonconforming use special permit, which allows a use to continue, under certain conditions, even though it has been determined – through the zoning regulation that rendered it nonconforming – that the use is *not* in harmony with the general zoning plan. The nonconforming use special permit is an administrative mechanism for permitting a nonconforming use to continue within limitations set by the Village.

Municipalities may deal with nonconforming uses in a variety of ways, not just the three ways listed in Defendants’ Memorandum of Law at 7-8. “[M]unicipalities in New York are free to seek solutions of the nonconforming-use problem which seem feasible under their particular local circumstances.” Salkin, New York Zoning Law and Practice

at § 10:04 (2005). The Village of Croton-on-Hudson chose to “sol[ve its] nonconforming use problem” by requiring changes to nonconforming uses to operate under a special permit. Controlling nonconforming uses by requiring a special permit or similar approval is recognized as valid by the two leading treatises on zoning and planning. Rathkopf, The Law of Zoning and Planning, § 51A.03; Salkin, New York Zoning Law and Practice at § 10.28 (“Some municipalities seek to accommodate the needs of the nonconforming user to the interests of landowners in the area of the use, by requiring the former to get administrative approval of a proposed change of use.”).

As a vehicle for regulating uses that are not in harmony with the Village’s general zoning plan, Croton-on-Hudson’s nonconforming use special permit is governed by the rules governing nonconforming uses, the overarching one of which is: ““The law . . . generally views nonconforming uses as detrimental to a zoning scheme, and the overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination.”” Rudolf Steiner Fellowship Foundation v. DeLuccia, 90 N.Y.2d 453, 458, 662 N.Y.S.2d 411, 413 (1997). More recently, the Court of Appeals stated: “While nonconforming uses of property are tolerated, the overriding policy of zoning is aimed at their eventual elimination.” P.M.S. Assets, Ltd. v. Zoning Board of Appeals of the Village of Pleasantville, 98 N.Y.2d 683, 685, 746 N.Y.S.2d 440, 441 (2002).

In Valatie v. Smith, 83 N.Y.2d 396, 610 N.Y.S.2d 941 (1994), which is analogous

to – although admittedly not on all fours with – the case at bar, the Court of Appeals considered the issue of whether a village could terminate the nonconforming use of a mobile home upon the transfer of ownership of either the mobile home or the land on which it sat. The Supreme Court had ruled that the termination of the use was unconstitutional on the grounds that “the right to continue a nonconforming use runs with the land,” and the Appellate Division affirmed. 83 N.Y.2d at 399, 610 N.Y.S.2d at 943.

The Court of Appeals reversed and upheld the provision allowing for termination of the nonconforming use upon change in ownership. The Court recognized: “In light of the problems presented by continuing nonconforming uses, this Court has characterized the law’s allowance of such uses as a ‘grudging tolerance’, and we have recognized the right of municipalities to take reasonable measures to eliminate them.” 83 N.Y.2d at 400, 610 N.Y.S.2d at 943. The Court rejected the trailer owner’s argument – the same argument defendants make in the case at bar – that it is a “‘fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it.’” 83 N.Y.2d at 403, 610 N.Y.S.2d at 945. The Court reasoned: “Defendant misconstrues the nature of the prohibition against *ad hominem* zoning. The hallmark of cases like [the cases relied on by defendant] is that an identifiable individual is singled out for special treatment in land use regulation. No such individualized treatment is involved in the present case. All similarly situated owners are treated identically.” 83 N.Y.2d at 403, 610 N.Y.S.2d at 945.

In Valatie, the Court of Appeals ruled that a village may make the continuation of a nonconforming use dependent on a particular person's continuing the use. Once that person gives up the use, the right to the use is lost. By way of analogy, under the Croton-on-Hudson Code, the use of 1A Croton Point Avenue as a transfer station existed only by virtue of – or was dependent on – the nonconforming use special permit. Once the special permit was terminated, the right to continue the use was lost.

POINT V

THE NON-RENEWAL OF METRO ENVIRO'S NONCONFORMING USE SPECIAL PERMIT TERMINATED THE RIGHT TO OPERATE THE NONCONFORMING USE.

In changing from one nonconforming use to another, Metro submitted to making its use conditional upon compliance with the special permit conditions, as well as subject to its termination, if the conditions were not met. The Zoning Code provides that renewal of a special permit “shall be withheld” if “[t]he terms and conditions of the original special permit have not been or are not being complied with.” Croton-on-Hudson Zoning Code § 230-56. When Metro – through its own actions – repeatedly violated substantial conditions of the special permit, the Board of Trustees “withheld” the special permit and the right to continue the nonconforming use. This termination of the special permit was upheld by the Court of Appeals in Metro Enviro Transfer, LLC v. Village of Croton-on-

Hudson, 5 N.Y.3d 236, 800 N.Y.S.2d 535 (2005).

Because the nonconforming use special permit no longer exists, there is no longer any right to the use that a subsequent operator can succeed to. It would violate the well-settled rules of statutory construction discussed in Point II above to construe the Zoning Code's provision for a nonconforming use special permit as allowing the special permit to continue indefinitely. That would completely undermine the Village's control of – and right to eliminate – nonconforming uses. “Disallowing the perpetuation of nonconforming uses at an appropriate time and under reasonable regulatory circumstances comports with the law's grudging tolerance of them in the first instance.” Pelham Esplanade Inc. v. Board of Trustees of Village of Pelham Manor, 77 N.Y.2d 66, 71, 563 N.Y.S.2d 759, 761 (1990).

Unless revocation of the special permit terminates the non-conforming use, the Village could be burdened with an endless series of transfer stations on this site, each of which violates the conditions of the special permit, has its permit revoked, is replaced by another C&D facility that violates its special permit, has it revoked, and so on. It cost the Village three years of time and roughly \$700,000 to terminate Metro Enviro's special permit. To have to repeat this process indefinitely would not comport with the policy of the law on nonconforming uses.

Since the transfer station existed only by virtue of the nonconforming use special permit, once the permit terminated, the right to operate the use terminated. The

termination of the nonconforming use special permit for 1A Croton Point Avenue terminated the right *of anyone* to continue the nonconforming use. As the Court of Appeals stated in Pelham Esplanade Inc. v. Board of Trustees of Village of Pelham Manor, in refusing to allow a nonconforming apartment building destroyed by fire to be rebuilt, "The public interest preferring the elimination of nonconforming uses, having been postponed, ripens into actuation." 77 N.Y.2d at 70, 563 N.Y.S.2d at 761.

POINT VI

IF THIS COURT WERE TO RULE THAT A C&D
TRANSFER STATION COULD CONTINUE AS A
NONCONFORMING USE, A NEW OPERATOR OF
THE FACILITY WOULD HAVE TO OBTAIN A
SPECIAL PERMIT FROM THE VILLAGE.

If the Court were to disagree with the Village's position that the right to continue the nonconforming use terminated with Metro Enviro's loss of the nonconforming use special permit, at a minimum, it would have to require any new operator of the nonconforming use to obtain a new nonconforming use special permit. As argued above, the right to operate a transfer station existed only by virtue of the nonconforming use special permit. Since the special permit no longer exists, a new one would be necessary to continue the nonconforming use.

If this court were to rule that another operator could merely succeed to Metro Enviro's permit, it would be granting the new operator a greater right than Metro Enviro

had; even Metro Enviro had to apply for a renewal of the special permit. Indisputably, the Village could require Metro Enviro to apply for a renewal of its special permit, and, in considering the renewal application, the Board could “make commonsense judgments in deciding whether [the] application should be granted.” Twin County Recycling Corp. v. Yevoli, 90 N.Y.2d 1000, 1002, 665 N.Y.S.2d 627, 628 (1997).

The renewal of the special permit would not be automatic. In a case closely analogous to the case at bar, the Second Department Appellate Division ruled that the Town of Islip’s Board of Appeals could refuse to renew a special permit when there were changed circumstances. The applicant had operated a transit mix plant by special permit at a certain location. The Islip zoning code permitted such plants only in undeveloped areas. The applicant first received the permit in 1961 for a five-year period, and it was renewed several times. In 1989, when the applicant applied for another extension of the special permit, it was denied, on the ground that the area was no longer undeveloped. 4900 Vets Corp. v. Scheyer, 198 A.D.2d 277, 603 N.Y.S.2d 544 (2d Dep’t 1993). If that renewal could be denied because of a change in the neighborhood, the Village must be permitted to consider the change in companies running the C&D operation.

If this Court did not require a subsequent operator to obtain a special permit, it would be depriving the Village of its obligation to insure that any entity operating a waste facility in the Village is capable of doing so without harming the environment and/or the people of the Village. Without requiring a new operator to submit its record for review

by the Village, the Court could allow a company with an even worse compliance record than Metro to do business in the Village. Such a possibility would mean that the Village might have to spend another three years and almost three-quarters of a million dollars in litigation, if the new operator turned out to be problematical.

There is no doubt in the law that the Board of Trustees could deny a special permit to a waste company if it had substantial reason to believe that the company would operate the transfer station in such a manner as to be injurious to the public and the environment. In deciding whether or not to grant a special permit, a board of trustees (as opposed to a zoning board of appeals or planning board) may consider any factors relevant to the proposed use. “Where the legislative body that enacts an ordinance has reserved to itself the dispensing power to grant a permit for a particular purpose, it need not set forth in the ordinance any standards at all with respect to the issuance of such permit. . . . [T]he question of whether it should issue a permit is left to its untrammelled discretion, so long as the discretion is not exercised capriciously.” Shell Oil Co. v. Farrington, 19 A.D.2d 555, 555, 241 N.Y.S.2d 152, 154 (2d Dep’t 1963). Accord, Snake Hill Corp. v. Town Board, 304 A.D.2d 670, 757 N.Y.S.2d 484 (2d Dep’t 2003).

Given the Village’s experience with the prior transfer station operator – which, in the words of the Court of Appeals, “repeatedly and intentionally violated conditions of the permit;” repeatedly offered the Village assurances that, although it did not comply in the past, it would comply in the future; and repeatedly went on to defy those assurances –

the Village would be irresponsible in not examining the operating history of any new company seeking to operate a waste transfer station at 1A Croton Point Avenue.

The Village's need to investigate NIR's operational history is not merely theoretical. Over the last six months, the Village has learned that several waste facilities in the Northeast owned and/or operated by NIR's parent company, Regus Industries, LLC ("Regus"),¹ have been the subject of governmental enforcement actions, or have been investigated, for violating federal, state, and local permitting requirements.

Regus operated the Warren Hills C&D Landfill in Ohio at the time the Ohio Attorney General commenced an action for a series of violations in operating the landfill. This action resulted in a consent order between the State and Warren Hills. Warren Hills continued to violate the consent order, resulting in the State of Ohio commencing a contempt proceeding. In addition, while Regus was operating the Warren Hills Landfill, the federal Agency for Toxic Substances and Disease Registry warned of an "urgent public health hazard" posed by high concentrations of hydrogen sulfide at the landfill. Subsequently, the Emergency Response Branch of the United States Environmental Protection Agency determined that a substantial public health threat was posed by the site. Stecich Affirmation, Exhibits 7 and 8.

In addition, the Village learned from two officials in the Ohio Environmental

¹ NIR is a wholly owned subsidiary of Regus, apparently created for the purpose of operating the proposed transfer station in Croton-on-Hudson.

Protection Agency that there was a "series of serious violations" by the Sunny Farms Landfill, another Regus operation. The Village reviewed hundreds of documents related to the site and uncovered a host of violations, including accepting unauthorized waste, inadequate and falsified record keeping, repeated leachate outbreaks, exceeding permit limits, and other substantive environmental violations. The documents also revealed that Andreas Gruson, the principal of NIR, had some involvement with the Sunny Farms operation. Stecich Affirmation, Exhibit 10.

Finally, residents of Brockton and Avon, Massachusetts, the site of another Regus C&D transfer station, Champion City, have contacted the Village about violations of conditions the Town had imposed on the transfer station there, including violations of the hours of operation, rules requiring that trucks and train cars containing debris be covered, dust spreading beyond the site, and train cars leaking dirty fluids into the public water supply.² Stecich Affirmation, Exhibit 9.

The Village recognizes that the information it received is incomplete, and that NIR must be given an opportunity to respond to it. But, in view of what the Village has learned, it must be given the opportunity to conduct a thorough investigation into Regus's operation of waste facilities in other locations.

² The Village submitted the information described above to the Westchester County Solid Waste Commission in its proceedings to grant a hauler's license to NIR. The County issued the license nonetheless. Throughout the proceedings, it appeared that the Commission's focus was on whether the applicant had a criminal history.

POINT VII

A TRO MUST BE ISSUED TO THE VILLAGE BECAUSE IT IS LIKELY TO SUCCEED IN THE MERITS OF THIS ACTION AND THE EQUITIES WEIGH HEAVILY IN THE VILLAGE'S FAVOR.

As discussed in the Affirmation of Marianne Stecich dated December 27, 2005, Village Law §§ 7-714 and 20-2006 entitle the Village to obtain an injunction to enforce its zoning law. As shown above, the operation of a C&D transfer station at 1A Croton Point Avenue, without obtaining either a use variance or, at a minimum, a special permit, from the Village would violate § 230-8 of the Croton-on-Hudson Zoning Code. The Village need make no further showing.

Nonetheless, a weighing of the equities tips decidedly in the Village's favor. The Village must be given the opportunity to ensure that any entity operating a transfer station in a small residential village is likely to run it in an environmentally safe manner. It is not sufficient for defendants to argue that the Village will be afforded adequate protection by the State DEC permit and the County Solid Waste Commission license. Those permits do not address all the issues that a Village special permit would address. That is why the Village issued 15 pages of conditions to the Metro Enviro special permit.

Nor would it be sufficient protection to the Village to make NIR's operation subject to the Metro Enviro conditions. Eight years have elapsed since the special permit was issued to Metro Enviro and conditions may have changed. More importantly, the

Village must be able to assure its citizens that a new operator will manage a waste facility in such a way that it will not harm their health, safety, and welfare.

Any harm to defendants of having to secure Village approval is of their own making. Greentree could have rented the property for a permitted use in the district, or it could have required its potential tenant to apply for a special permit seven months ago, upon reading this Court's August 25, 2005 decision.

NIR also could have applied for the special permit seven months ago. Any actions it took to start up operations at 1A Croton Point Avenue were taken even though it knew that the Village's position was that it must submit to Village review. As the Appellate Division held in Preble Aggregate, Inc. v. Town of Preble, the applicant could not rely on the \$240,000 it spent in obtaining permits when it knew of the "Town's consistent opposition to the proposal." 263 A.D.2d 849, 851, 694 N.Y.S.2d 788, 792 (3d Dep't 1999).

Neither of the defendants can claim losing an investment in the improvements on the property, because, according to an affirmation of David Steinmetz, dated February 3, 2003, the improvements were made at Metro Enviro's "sole substantial cost and expense." This affirmation is annexed to the Stecich Affirmation as Exhibit 5.

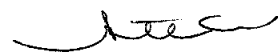
Finally, defendants' claim of harm to Westchester County rings hollow. Not only is their claim unsupported by any facts; it is contradicted by a recent conversation the Village's Special Environmental Counsel had with the Executive Director of the County Solid Waste Commission. As described in the Affirmation of Michael Gerrard, annexed

to the Stecich Affirmation as Exhibit 6, the Executive Director told him that he had not heard of any problems nor received any complaints about the disposition of construction and demolition debris in the County since the Metro Enviro facility was closed this past summer.

Conclusion

For all of these reasons and the reasons stated in Marianne Stecich's Affirmation dated December 27, 2005, the Village of Croton-on-Hudson respectfully urges this Court to issue a temporary restraining order and a preliminary injunction enjoining Northeast Interchange Railway from commencing transfer station operations at 1A Croton Point Avenue without obtaining from the Village either a use variance or a nonconforming use special permit.

Dated: Tarrytown, New York
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